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No. 83-1310

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

EDWARD T. YOUNG, JR., WILLOW WATER DISTRICT, SOUTH CHERRY CREEK LAND COMPANY, SMOKEY HILLS LAND COMPANY, EAST CHERRY VALLEY WATER AND SANITATION DISTRICT, ADOLPH COORS COMPANY,

Petitioners,

v.

SOUTHWESTERN COLORADO WATER CONSERVATION DISTRICT, *et al.*,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF COLORADO

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February 24, 1984

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This brief is submitted in support of the petition herein by Glen Schmidt, Betty Jo Schmidt, Jack E. Schmidt, Benton Land and Livestock Company, Merril Hastings, Ben Wurtsmith, Stone Creek Company, Grouse Mountain at Vail, Ltd., Eagle-Vail Metropolitan District, Benchmark at Beaver Creek, Avon Metropolitan District, Fred Green and Leonard Horn,[1] respondents here, and appellees and cross-appellants below. All are land-

[1] None of the named corporations have either a parent or a subsidiary other than wholly owned.

owners in the State of Colorado deriving title, by mesne conveyances, from the United States of America by land patents. Those patents have no reservation of waters, either tributary or nontributary, except as set out in the laws under which such patents were issued.[2]

The Statement of Questions Presented and Reasons for Granting the Writ set out in the Petition herein, are adopted by these respondents in their entirety.

1. While all of these respondents are fee owners of lands, some are such owners of lands in Routt and Eagle Counties, Colorado, overlying underground aquifers known as the Burns Basin. According to the applications for underground nontributary water rights made in the trial courts below by the Nedlog Technology Group (Nedlog) for Burns Basin nontributary underground water, the aquifers underlie an extensive area including all or parts of four north central Colorado counties, including Routt and Eagle Counties.[3] The aquifers were there said to contain or store some 20,000,000 acre feet of recoverable water (App. 41).

Nedlog alleged it had entered into contracts with overlying property owners of the Burns Basin to produce the underlying nontributary water, paying the overlying owner a royalty thereon through the means of a percen-

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[2] Though each specific title has not been examined it is believed that in most cases such patents issued under either the Act of 1866, 14 Stat. 253, or the Desert Land Act of 1877, 19 Stat. 377. Reference is made to the Petition herein at pp. 10-11 as to the language of such Acts relating to water. Some may also contain under later laws a reservation of certain or all minerals, but not water. Accord, *Andrus* v. *Charlestone Products Co.*, 436 U.S. 604 (1978).

[3] Approximately 70% of the land area was there said to be in federal ownership.

tage of the water so produced (App. 41-43). The respondents here appearing have not entered into such contracts, but if petitioners' arguments are correct, their right to so do has effectively been denied by the opinion and judgment below. It seems apparent that the referenced contracts were made in reliance on the doctrine of private ownership of nontributary water expressed in *Whitten* v. *Coit*, 153 Colo. 157, 385 P.2d 131 (1963). Consequently, some of these respondents, with knowledge of the Burns Basin aquifers, find themselves directly affected by the decision below as to all three questions presented by the petition herein.

2. As argued in the petition, the court below ruled that the overlying landowner never had a property interest in the nontributary ground water, despite its earlier contrary conclusion in *Whitten*, *supra*. To do so, it misconstrued federal statutes and ignored federal common law.[4] The result, it is submitted, is to take property without just compensation. This is a substantial federal question.

Title 28 U.S.C. § 1257, in addition to providing for a writ of certiorari in subsection (3), by subsection (1)[5] and

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[4] To buttress its conclusion that underground nontributary water had been separated from the land by the Act of 1866 and the Desert Land Act of 1877, the court below adverted to the doctrine "that land grants are construed favorably to the [Federal] government . . ." (App. 98). The cases cited (*United States* v. *Union Pacific Ry.*, 353 U.S. 112 (1957) and *Watt* v. *Western Nuclear, Inc.*, ___ U.S. ___, 76 L.Ed2d 400, 103 S. Ct. ___ (1983)) do not deserve that reliance since they are not appropos the situation here. Both cases involve a determination as to "minerals" (*See* n. 2). There is no uncertainty or ambiguity as to what water was separated from the land in either of the two Acts above mentioned or federal common law.

[5] By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

subsection (2)[6] provide for appeal to this Court. It can be argued the decision below makes invalid the attempt by the United States under the Acts of 1866 and 1877 and federal common law to convey by its patents the water in the soil (nontributary) just as effectively as it thereby conveys all other interests in the patented lands.[7] The decision can therefore be said to be appealable under (1) *supra*. So also it can be argued that the decision (with like force and effect as a statute) is repugnant to the Constitution of the United States (Articles V and XIV, Sec. 1). The decision can therefore be said to be appealable under (2) *supra*.

While *Hughes* v. *Washington*, 389 U.S. 290 (1967), relied on so strongly by petitioners here came to this Court by writ of certiorari, the Court found that federal law governs. Quoting from *Borax, Ltd.* v. *Los Angeles*, 296 U.S. 10 (1935), this Court in *Hughes* said:

> . . . [t]he question as to the extent of this federal grant, that is, as to the limit of the land conveyed . . . is necessarily a federal question. It is a question which concerns the validity and effect of an act done by the United States; it involves the ascertainment of the essential basis of a right asserted under federal law . . .

While petitioners unquestionably have reasons for choosing certiorari rather than appeal, a judgment not here questioned, the fact that the case may have been

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[6] By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

[7] Subject, of course, to appropriate reservations and exceptions directed by the law under which patent issued.

appealable as raising substantial questions of constitutional, statutory and federal common law[4] would appear strongly to support the granting of the within petition for writ of certiorari.

Accordingly, these respondents pray that the writ of certiorari be granted.

Respectfully submitted,

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[4] In considering cases from this Court, greater consideration should have been given by the court below to the language in *Leo Sheep Co.* v. *U.S.*, 440 U.S. 668, 687 (1979) as follows: "Generations of land patents have issued without any express reservation of the right now claimed by the Government."